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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 174

ERNA CHRISTIANI-ONKEN, a/k/a ERNA CHRISTIANI,
Petitioner

v.

ROBERT F. KENNEDY, Attorney General, and as Successor to the Alien Property Custodian

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

ERNA CHRISTIANI-ONKEN, a/k/a/ ERNA CHRISTIANI,
Petitioner

v.

ROBERT F. KENNEDY, Attorney General, and as Successor to the Alien Property Custodian.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Erna Christiani-Onken, also known as Erna Christiani, appellee below, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case.

OPINIONS BELOW

The findings of fact and the conclusions of law of the District Court are unreported. They are set forth at pages 27-33 of the certified transcript of the record herein (R. 27-33), and the judgment of that court is set forth at page 34 of the record (R. 34). The opinion

of the Court of Appeals for the District of Columbia Circuit is not yet reported. It is set forth at pages 172-174 of the certified transcript of the record herein (R. 172-174) and in Appendix A hereto (pp. A-1—A-3, *infra*). The judgment of the court is set forth at page 175 of the record and in Appendix B hereto (pp. B-1, *infra*).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit, reversing the District Court, was dated and entered March 15, 1962 (R. 175). Since the *per curiam* opinion decided the case solely on the authority of *N. V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (U.S.C.A.D.C.) Appendix C hereto (pp. C-1—C-7 *infra*), decided February 1, 1962 (R. 172 at 174), no petition for rehearing was filed. The jurisdiction of this Court is invoked under Tit. 28 U.S.C., Secs. 1254(1) and 2101(c).

QUESTIONS PRESENTED

Whether an individual resident within the territory of a neutral nation (Switzerland) at the time of the vesting of her property under the Trading with the Enemy Act, as amended, is an "enemy" within the meaning of Section 2(a) of such Act so as to preclude her from maintaining a suit under Section 9(a) of the Act for the return of her property solely because she had previously resided within the territory of an enemy nation (Germany) with which the United States was at war.

Whether if the Trading with the Enemy Act, as amended, were interpreted to include such a resident of a neutral country within the definition of "enemy",

the Act would come into conflict with the Fifth Amendment to the Constitution of the United States by taking private property for public use without just compensation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fifth Amendment to the Constitution of the United States, and Sections 2(a) and 9(a) of the Trading with the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 2(a) and 9(a) (1958) which are set forth in Appendix E hereto (pp. E-1-E-2, *infra*).

STATEMENT

The jurisdiction of the United States District Court for the District of Columbia was based upon Section 9(a) of the Trading with the Enemy Act, as amended *supra*, (hereinafter sometimes referred to as "the Act"). This is an action to recover certain property vested by the Attorney General under Vesting Orders Nos. 18396 and 18400. The property in question represents petitioner's share of the American estate of her deceased Swiss father and consists of cash and securities which at the time of vesting were held at the Swiss American Corporation and the Guaranty Trust Company of New York, both located in New York City.

Petitioner was born in Switzerland in 1911 of German parents and had German nationality at birth. She and her parents became naturalized Swiss citizens in 1919. In 1931 she married a German citizen and moved to Germany to live with him. By her marriage she acquired German citizenship. In the middle 1930's petitioner, her husband and one child moved to the

little town of Konstanz which is situated astride the German-Swiss border. Another child was born to them there and they lived in the German sector of Konstanz until April of 1946 when petitioner and her two children left Germany and entered Switzerland on a temporary permit. She and the children were subsequently joined there by her husband. Petitioner and her family have continued to reside in Switzerland ever since. At the earliest date possible, namely, 1958, petitioner re-acquired her Swiss citizenship.

After trial, the District Court found that when petitioner left Germany in April of 1946 she intended to leave Germany permanently and when she entered Switzerland she intended to reside there permanently. None of the District Court's findings of fact were disturbed by the court below. The District Court held on the authority of *Willenbrock* v. *Rogers*, 255 F. 2d 236 (3 Cir. 1958) Appendix D hereto (pp. D-1—D-6, *infra*) that petitioner was not an enemy within the definition of Section 2(a) of the Act and therefore was entitled to the return of her property which had been vested by the Attorney General.

The Court of Appeals, *per curiam*, reversed the decision of the District Court on the authority of *N. V. Handelsbureau La Mola* v. *Kennedy, supra*, App. C-1., decided after argument and before the decision of the instant case.* The ground of the decision in the court below is the interpretation of the Act as defining enemy to include any person who had been a resident of enemy territory at any time during the war regardless of his residence at the time of the vesting order.

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* That case is hereinafter referred to as "*La Mola*". A petition for a writ of *certiorari* in that case, No. 907, was filed in this Court on April 26, 1962.

This case raises precisely the same legal questions raised in *Rommel, et al. v. Kennedy*, No. 1023. It was argued with those cases below and the decision of the Court of Appeals was handed down on the same day. For the purpose of petitioning for a writ of *certiorari*, it was not consolidated with the *Rommel, et al.* cases as would be permitted by the provisions of sub-paragraph 5 of Supreme Court Rule 23 for the reason that petitioner only instructed counsel to file a petition for a writ of *certiorari* on the day that the petition in the other cases was sent to the printer.

REASONS FOR GRANTING THE WRIT

Introduction

The *per curiam* opinion below was not without virtual dissent. Chief Judge Miller, concurring only in the result, states:

> "While this case was under submission, my brothers here and a third judge handed down a decision in *N. V. Handelsbureau La Mola* v. *Kennedy*, which had been heard shortly before the hearing of the present appeals. As I did not participate in that case I had no opportunity to protest against the decision rendered. Although I do not agree with it, the *Handelsbureau* opinion is a binding precedent which requires reversal here. For that reason only, I concur in the result of the majority opinion in this case." (R. 174, App. A-3).

In *La Mola* the court held that property of a Netherlands corporation could be vested and confiscated on the ground that the Netherlands had been occupied by the military and naval forces of the enemy, even though the vesting took place on December 15, 1950, several years after the enemy occupation ceased.

The petitioner does not question the authority of the Attorney General (Alien Property Custodian) to vest and retain enemy property after hostilities have ceased but before the war is terminated. She does not question the legality of the vesting of her property, because admittedly, she was a foreign national and, therefore, her property was subject to vesting under Section 5(b) of the Act. But, as this Court held in *Clark v. Uebersee Finanz Korp., A.G.*, 332 U.S. 480 (1947) the Attorney General can vest property that he cannot hold against a 9(a) action brought by a foreign national who is a non-enemy. It is petitioner's contention that at the time of the vesting of her property she, as a resident of neutral Switzerland, was a non-enemy and therefore is entitled to a return of her property in this 9(a) action.

Since, as stated earlier, the legal issues in this case are the same as those in *Rommel, et al.* v. *Kennedy*, No. 1023, the reasons for granting the writ here are the same as in those cases. Accordingly, the contentions made in that petition are incorporated herein by this reference as well as being set forth in summary form below.

I

The decision below is squarely in conflict with the decision of the Third Circuit Court of Appeals in *Willenbrock* v. *Rogers, supra,* App. C-1. In that case two vesting orders had been issued. It appeared from plaintiff's complaint that one had become effective while she was a resident of Germany and the other after she had returned to the United States and taken up residence here. Judge Goodrich, speaking for the court held that in an action under Section 9(a) of the

Act the plaintiff was entitled to recover the property seized by the second vesting order if she could establish that at the time of seizure she was no longer resident within Germany.

Willenbrock is right and *La Mola* is wrong because *Willenbrock* accords with the common law rule and the Congressional intent as shown both by a reading of the Act and its legislative history. Both *Willenbrock* and *La Mola* in arriving at conflicting results cite this Court's opinion in *Swiss Nat. Ins. Co.* v. *Miller*, 267 U.S. 42 (1925). A reading of that case, however, shows that it supports the court in *Willenbrock* and that the court below in *La Mola* seemed to rely principally on a quotation from the case which it read out of its context.

The other authorities which the court cited in *La Mola* to support the result it reached, *Hansen* v. *Brownell*, 18 U.S. App. D.C. 230, 234 F. 2d 606 (1956); *Bank Voor Handel en Scheepvaart, N.V.* v. *Kennedy*, 288 F. 2d 375 (1961), cert. den. 366 U.S. 962; and *Orme* v. *Northern Trust Company*, 410 Ill. 354, 102 N.E. 2d 335 (1951), cert. den. sub nom. *Hardenberg* v. *McGrath*, 343 U.S. 921, (1952), are irrelevant.

Hansen concerned an enemy agent and it was there held that one who by his own free choice commits hostile acts against the United States acquires enduring enemy status for the purpose of the Act. This Court in *Guessefeldt* v. *McGrath*, 342 U.S. 308, 318 (1952) in commenting on *The Venus*, (U.S.) 8 Cranch 253 (1814) noted a distinction between enemy status which follows location and enemy status arising from hostile acts and suggests the enduring quality of the latter.

Bank Voor Handel concerned property which was vested during the German occupation of Holland and

in the *Orme* case the vesting order was issued while the claimants were resident within Germany. Petitioner does not dispute that property seized at the time of the owner's residence in enemy territory cannot be recovered in a 9(a) action. None of the cases which the court below cited are authority for the decision in *La Mola*, and certainly they offer no authority for its holding in the instant case that a person who acquires enemy status solely because of residence in enemy territory retains that status after a change of residence to non-enemy territory as to property not then vested.

II

The construction of the Act by the court below is a strained construction which is contrary to the common law and the Congressional intention as shown by the legislative history of the Act. At common law the cases are unanimous in holding that enemy status gained by residence in enemy territory ceases by a change of residence to non-enemy territory with respect to property not then seized. *The Indian Chief*, 3 C. Rob. 12 (Eng. 1801); *The Venus, supra; The Friendschaft*, (U.S.) 3 Wheat. 12 (1818); *United States* v. *Guillem*, (U.S.) 11 How. 47 (1850); *The Francis*, 1 Gall. 614, Fed. Cas. No. 5034 (1813), aff'd (U.S.) 8 Cranch 363; *Duguet* v. *Rhinelander*, 2 Johns. Cas. (N.Y.) 476 (1802).

It seems clear that the Congress intended that the definition of enemy contained in the Act would be within the common law rule. The House Report on the bill which became the Act (H. Rep. 85, 65th Cong. 1st Sess., June 21 (1917)) stated that:

> "The purpose of the bill is not to create new international rules or practices but to define and mitigate them."

If, then, no new rules were created, Congress intended to enact into the statute a definition of enemy which was no more severe than the international and common law rule. Both the Executive and Legislative Branches of the Government so understood and interpreted the Act, as is shown by a subsequent amendment to the Act. See *e.g.*, H. Comm. Hearings, 1920, Vol. 232-1, Point 8, quoted in *Swiss Nat. Ins. Co., supra*, p. 66. The exchange there between the Assistant to the Solicitor of the State Department and the Chairman of the House Foreign and Interstate Commerce Committee clearly shows that for the purpose of the Act enemy status was understood by both the Executive and Congress to mean *enemy status determined by the facts existing at the time of seizure.*

The court below did not even so much as mention the legislative history of the Act, but it did refer to the Joint Resolution of Congress of October 19, 1951.* That Resolution, however, has no relevance to the instant case because by its own terms it provided that nothing contained in it should alter the status as it existed immediately prior to its enactment, of Germany or of any person with respect to any property or interest. That Resolution was legislation requested by the Executive and it had two purposes—(1) to terminate the war with Germany and (2) by a "savings clause" to avoid the extinguishment of the existing vesting powers which otherwise would automatically result from the termination of the war. It was not intended to, and it did not, change the definition of enemy or alter the rules for confiscating property under the Act and the Government should not be heard to contend that it did.

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* 65 Stat. 451 (1951), 50 U.S.C. Appendix note preceding § 1 p. XX (1958).

III

The decision of the court below violates petitioner's protection under the Fifth Amendment against the taking of property without the payment of just compensation. As shown above, when petitioner abandoned her residence in Germany and assumed residence in neutral Switzerland, which she did five years prior to the vesting of her property, she was, at common law, a friendly alien. *Supra*, p. 8. Friendly aliens are entitled to the protection of the Fifth Amendment. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931); *Silesian American Corp.* v. *Clark*, 332 U.S. 469, 479-484 (1947). This Court in *Guessefeldt* v. *McGrath*, *supra*, p. 318, said that construing the Act in such a way as to confiscate the property of a person who at common law *might* not be an enemy raised debatable constitutional questions which should be avoided. It would be otherwise if the Congress had clearly defined enemy to include persons not within the common law concept of "enemy"; then the constitutional question would have to be squarely faced. Here there is nothing to indicate that Congress intended to expand the common law concept of "enemy". Thus, as in *Guessefeldt* the Act should be construed to avoid rather than raise the constitutional problem.

The Act should be construed to preserve petitioner's constitutional rights in a 9(a) action without relegating her to the Court of Claims. *Clark* v. *Uebersee Finanz Korp., A.G.*, 332 U.S. 480, 487, 488 (1947).

IV

The court below based its opinion solely upon the decision in *La Mola*. At the time of the argument of the instant case, the *La Mola* decision had not come

down and petitioner had no opportunity to analyze it or argue it before the court. If the petition for *certiorari* is granted in *La Mola* it should be granted in the instant case in order to give petitioner her day in court and thus prevent a substantial injustice.

CONCLUSION

The court below erred in deciding the instant case contrary to the decision of the Third Circuit Court of Appeals in *Willenbrock*. It has construed the Act contrary to the common law and the Congressional intent. Moreover, it has decided a constitutional question which this Court has said should be avoided where possible. It has given the Act a strained construction which effects a confiscation. This Court has said:

> "Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited." *Guessefeldt* v. *McGrath*, *supra*, p. 319.

The only practical effect of the construction of the Act in *La Mola* as applied in the instant case is to permit the United States Government to profit by reducing the cost of the war to itself by taking the property of a person who has committed no hostile act against the United States, who some five years before her property was vested had severed her relations with the enemy state, and who, as a result has no recourse to it for compensation. A decision which requires such a strained construction of the Act to bring about such a harsh and unjust result should not be permitted by this Court to stand.

Wherefore petitioner prays that a writ of certiorari may issue.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16364

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, APPELLANT

v.

ERNA CHRISTIANI-ONKEN, A/K/A ERNA CHRISTIANI, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided March 15, 1962

Mrs. Pauline B. Heller, Attorney, Department of Justice, with whom *Assistant Attorney General William H. Orrick, Jr.*, *Messrs. Norton Hollander* and *Arthur R. Schor*, Attorneys, Department of Justice, were on the brief, for appellant. *Mrs. Mary P. Clark*, Attorney, Department of Justice, also entered an appearance for appellant.

Mr. James H. Mann, with whom *Mr. John W. Pehle* was on the brief, for appellee.

BEFORE WILBUR K. MILLER, *Chief Judge*, and PRETTYMAN and FAHY, *Circuit Judges*.

PER CURIAM: Appellee filed suit in the District Court under section 9(a) of the Trading with the Enemy Act[1] against the Attorney General to recover assets located in

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[1] 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40 (1958).

the United States which on August 30, 1951, had been vested by appellant's predecessor as Alien Property Custodian. The District Court entered judgment for appellee and directed appellant to convey the property to appellee.

Appellee had resided in Germany with her husband between 1931 and 1946, during which period she was a German citizen. In April 1946 she left Germany and entered Switzerland under a temporary permit. She has continued to reside in Switzerland except for brief visits abroad. In 1958 she reacquired Swiss citizenship, which she had lost by her marriage in 1931 to a German citizen.

Appellant contends that the District Court was without jurisdiction because appellee was concededly a resident of Germany during World War II, that she thus acquired enemy status within the meaning of section 2(a) of the Act, that this status was not removed by her departure from Germany in 1946 and the subsequent establishment of Swiss residence, and that, accordingly, she may not maintain a suit under section 9(a) of the Act, which is available only to one who is not an "enemy" as that term is defined in section 2(a).[2] Appellee contends to the contrary that enemy status must be determined in the circumstances existing at the time of the vesting of the property, at which time she was no longer a resident of Germany and had been residing within non-enemy territory for more than five years.

On the authority of *N. V. Handelsbureau La Mola* v. *Kennedy*, —— U.S. App. D.C. ——, —— F. 2d ——, the position of the Attorney General is sustained, the judgment is reversed, and the case is remanded with directions

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[2] The term "enemy" is defined in part as "any individual, partnership, or other body of individuals, of any nationality, resident within the territory . . . of any nation with which the United States is at war . . . ." 40 Stat. 411 (1917), as amended, 50 U.S.C. App. § 2(a) (1958).

to dismiss the complaint for lack of jurisdiction. See also *Kennedy* v. *Rommel*, —— U.S. App. D.C. ——, —— F. 2d —— decided this day.

It is so ordered.

WILBUR K. MILLER, *Chief Judge*, concurring in the result only: While this case was under submission, my brothers here and a third judge handed down a decision in *N. V. Handelsbureau La Mola* v. *Kennedy*[1] which had been heard shortly before the hearing of the present appeal. As I did not participate in that case, I had no opportunity to protest against the decision rendered. Although I do not agree with it, the *Handelsbureau* opinion is a binding precedent which requires reversal here. For that reason only, I concur in the result of the majority opinion in this case.

[1] No. 16,471, decided February 1, 1962.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

Civil 2705-58

No. 16,364

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *Appellant*,

v.

ERNA CHRISTIANI-ONKEN, A/K/A ERNA CHRISTIANI, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: WILBUR K. MILLER, *Chief Judge*, and PRETTYMAN and FAHY, *Circuit Judges*.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment .... of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby remanded to the District Court with directions to dismiss the complaint for lack of jurisdiction.

Per Curiam.

Dated: March 15, 1962

Separate opinion by *Chief Judge* WILBUR K. MILLER concurring in the result only.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16417

N. V. HANDELSBUREAU LA MOLA, *Appellant*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as successor to the Alien Property Custodian, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Decided February 1, 1962

Mr. Dinsmore Adams, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Lawrence S. Lesser* was on the brief, for appellant.

Miss Joan T. Berry, Attorney, Department of Justice, with whom *Assistant Attorney General William H. Orrick, Jr.*, *David C. Acheson*, United States Attorney, and *John G. Laughlin, Jr.*, Attorney, Department of Justice, were on the brief, for appellee. *Messrs. Arthur R. Schor* and *Walter T. Nolte*, Attorneys, Department of Justice, also entered appearances for appellee.

Before: EDGERTON, PRETTYMAN and FAHY, *Circuit Judges*.

FAHY, *Circuit Judge*: Appellant filed suit in the District Court, relying for jurisdiction upon section 9(a) of the Trading with the Enemy Act,[1] to recover property vested

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[1] 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40 (1958).

under the Act by appellee's precedessor as Alien Property Custodian.[2] The property consists of assets of appellant which were on deposit in banks in the United States. By the order now on appeal District Judge Walsh granted appellee's motion for summary judgment. We agree that the suit may not be maintained.

One cannot maintain a suit under section 9(a) to recover vested property unless the claimant is "not an enemy or ally of enemy," to quote the language of the section. "Enemy" is defined in section 2 of the Act as follows:

> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.[3]

This definition includes a corporation incorporated within any territory which is occupied by a nation with which the United States, at the time of the occupation, "is at war." Concededly the Netherlands was occupied by military forces of the enemy of the United States during World War II, and concededly also throughout the occupation period appellant was a corporation organized and existing by virtue of the laws of the Netherlands. Appellant accordingly acquired enemy status. It correctly points out, however, that the vesting order was not made until December 15, 1950. It contends that enemy status which bars recovery of prop-

[2] The powers and functions of the Alien Property Custodian were transferred on October 15, 1946, to the Attorney General. Executive Order 9788, 3 C.F.R. 575 (1943-1948).

[3] 40 Stat. 411 (1917), as amended, 50 U.S.C. App. § 2(a) (1958).

erty under section 9(a) must be determined as of the time of the vesting order, and that on December 15, 1950, the occupation had ended and hostilities had ceased, with the effect of ridding appellant of its previous enemy status.

We are not in agreement with the above contention. The war had not ended when appellant's property was vested, or until the Joint Resolution of Congress of October 19, 1951.[4] In this Resolution Congress provided that property which had been subject to vesting and seizure prior to January 1, 1947, would continue to be subject to the provisions of the Act. This included appellant's property, for during the occupation which preceded January 1, 1947, that property had clearly been subject to vesting and seizure. And it had not lost its status by the ending of hostilities prior to January 1, 1947. *Cf. Feyerabend* v. *McGrath*, 89 U.S. App. D.C. 33, 35, 189 F.2d 694, 696.

The purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during hostilities or enemy occupation. Property subject thereto during an occupation is available to control of the enemy in aid of its warfare against the United States and its allies. However, actual vesting might not then be possible. For example, the Custodian might not discover the property during the period of enemy occupation or, if discovered during such period, investigation might entail a considerable period of time before a determination is made that the property is owned or controlled by an enemy within the meaning of section 2 and therefore subject to seizure.

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[4] In declaring the end of World War II Congress provided that, notwithstanding this resolution . . . any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 . . . or which has heretofore been vested or seized under that Act . . . shall continue to be subject to the provisions of that Act . . . .

65 Stat. 451 (1951), 50 U.S.C. App. note preceding § 1 (1958).

Its usefulness to the enemy is not thereby obviated. Rather the contrary. Yet to immunize it because for some reason the vesting authority failed to reduce it to possession until hostilities have ceased, or the occupation ended, would leave untouched property which had been available to enemy control. Such immunization would also deprive the United States of valuable means of supporting its own war efforts. Those efforts, and the heavy responsibilities consequent upon a war, persist long after hostilities have ceased and occupied countries have been freed of the enemy.

For reasons thus suggested we think that in the absence of clearer language indicating the necessity for a different construction the enemy status appellant acquired during the occupation continued, insofar as section 9(a) is concerned, to the time of the vesting order; that is, we think that at that time the end of hostilities and of the occupation of the Netherlands had not removed appellant from the technical enemy status it had acquired during the occupation. *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E.2d 335 (1951), *cert. denied*, 343 U.S. 921. If this is so then appellant was an enemy within the meaning of section 9(a) when it filed the present suit.

Stated in a different manner, the definition of enemy in section 2 of the Act, as one who is "resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war" or "incorporated within such territory" is not to be construed as referring only to one who at the date of the vesting order is a resident of or chartered by a nation with which the United States "is [still] at war"; rather, it is to be construed as including a person who or corporation which, at the time of the vesting order, is one who has been a resident of an enemy occupied nation during its occupation or was then incorporated under the laws of an occupied territory and resident therein. "The word 'enemy' . . . of course refers to the person who or corporation which fulfilled the definition of an enemy during the

war." *Swiss Ins. Co.* v. *Miller*, 267 U.S. 42, 45. And lending some support to the position we take is *Hansen* v. *Brownell*, 98 U.S. App. D.C. 239, 234 F.2d 60. And see *Bank Voor Handel En Scheepvaart, N. V.* v. *Kennedy*, —— U.S. App. D.C. ——, 288 F.2d 375, *cert. denied*, 366 U.S. 962. Compare, however, *Willenbrock* v. *Rogers*, 255 F.2d 236, 238 (3d Cir. 1958).

It is suggested that the construction of "enemy" we adopt, and which has the result of enabling the United States to retain appellant's property without compensation, raises constitutional doubts under the Fifth Amendment. It is urged, therefore, that we should adopt a more limited construction which would preclude the confiscation of appellant's property. If, however, we are right in the reasons we have advanced in support of the construction we give the Act—that is, the efficacy of this construction in enabling the purposes of the Act to be fulfilled—then the same reasons remove the constitutional doubts. The constitutionality of confiscating enemy property in carrying out the war powers of course is not questioned.[5] A reasonable exercise of this aspect of the war powers permits the United States to reach property located within its borders which was available to or whose owner was under the control of the enemy while resident within occupied territory. To require as a constitutional matter that the property be actually vested during the occupation or before the end of hostilities would create a very substantial limitation upon the economies of warfare.

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[5] Denying a person recovery of seized and vested property is not a deprivation of property without due process when the claimant is found to be an enemy. "There is no constitutional prohibition against confiscation of enemy properties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 11; *Stoehr* v. *Wallace*, 255 U.S. 239, 245; *Uebersee Finanz-Korporation* v. *Brownell*, 433 F. Supp. 615, 620 (D. D.C. 1955), *aff'd sub nom. Von Opel* v. *Brownell*, 100 U.S. App. D.C. 341, 244 F. 2d 789, *cert. denied*, 355 U.S. 878. And see *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120-21.

We are cited to no precedent which holds with appellant's constitutional probings in the circumstances of the present case. The case of *Guessefeldt* v. *McGrath*, 342 U.S. 308, 318, turned on the construction to be given "resident within" Germany. While the Court points out that "friendly aliens are protected by the Fifth Amendment requirement of just compensation," citing *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, the Court found that the claimant never came within the definition of an enemy. It does not seem to us that this decision requires us to hold that one who concededly acquired, with respect to its property, enemy status during the enemy occupation of the Netherlands, under whose laws it was then incorporated, lost that status, with respect to its property, because the property was not vested while the occupation continued. This would be inconsistent with the purposes of the Act as gathered from its own text and with the congressional intention as expressed in the Joint Resolution of October 19, 1951.

The only reliance for consent of the United States to be sued in this case is section 9(a) of the Act. *Schilling* v. *Rogers*, 363 U.S. 666; *Bank Voor Handel En Scheepvaart, N. V.* v. *Kennedy, supra*; *Tiedemann* v. *Brownell*, 96 U.S. App. D.C. 9, 222 F.2d 802. Since that section does not cover the case, and this suit is in substance, though not in name, one against the United States to which it has not consented, the District Court properly awarded judgment for appellee. See *Bank Voor Handel En Scheepvaart, N. V.* v. *Kennedy, supra*. It goes without saying that this carries no possible implication of unfriendliness to the Netherlands. It rests solely on a technical enemy status acquired by appellant under the Trading with the Enemy Act by reason of the enemy occupation of the Netherlands and appellant's incorporation therein.

A further matter is noted. Before filing the instant suit in the District Court under section 9(a) appellant had applied to the Attorney General under the provisions of section 32(a)[6] of the Act for discretionary administrative

[6] 60 Stat. 50 (1946), as amended, 50 U.S.C. App. 32(a) (1958).

relief permitted by that section to technical enemies who could not qualify to sue under section 9(a). In response to the application appellee's predecessor advised appellant in writing as follows:

> Enclosed is the Order disallowing the above-numbered claim.
>
> For your information, it is the present practice of this Office, except in cases where a claim is clearly entitled to allowance, to remit the claimant whose right to sue is not barred by lapse of time to his remedy in court and thus avoid the possible delay and expense of a double set of hearings. Such procedure is authorized by an amendment to the Rules of Procedure for Claims of this Office, effective April 16, 1957 . . .
>
> Under the provisions of Section 33 of the Trading with the Enemy Act . . . a timely suit may be instituted under Section 9(a) of the Act for return of the property claimed in the event you are dissatisfied with the administrative action taken on your claim, and the enclosed order of disallowance does not prejudice in any way your right to sue.

On the basis of the foregoing appellant contends that the Government may not in equity and good conscience claim that appellant is ineligible to sue under section 9(a) for any reason other than one which would render it ineligible as a claimant under section 32(a). But the question before the District Court was one of jurisdiction. Whatever relief, if any, appellant may seek on the basis of the previous disallowance of its application under section 32(a), the District Court was without jurisdiction of the complaint in the present case. In this situation we remand for dismissal of the complaint. *Schilling* v. *Rogers, supra; Tiedemann* v. *Brownell, supra.*

It is so ordered.

APPENDIX D

MARIE LOUISE WILLENBROCK

v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian,
Appellant.

No. 12394.

United States Court of Appeals
Third Circuit.

Argued March 18, 1958.

Decided April 22, 1958.

Rehearing Denied May 27, 1958.

George B. Searls, Washington, D. C. (Dallas S. Townsend, Asst. Atty. Gen., Harold K. Wood, U. S. Atty., for the Eastern Dist. Pennsylvania, Philadelphia, Pa., Irwin A. Seibel, Marbeth A. Miller, Attys., Dept. of Justice, Washington, D. C., on the brief), for defendant-appellant.

T. Henry Walnut, Philadelphia, Pa., for appellee.

Before GOODRICH, STALEY and HASTIE, Circuit Judges.

GOODRICH, Circuit Judge.

This appeal concerns the application of words in the Trading with the Enemy Act, 50 U.S.C.A. Appendix, §§ 1-40. The plaintiff brought suit, under Section 9(a), of the Act, to recover certain property which had belonged to her and which was vested by orders of the Alien Property Custodian in 1947 and 1950. The district judge entered judgment in her favor. Willenbrock v. Brownell,

D.C.E.D.Pa. 1957, 152 F.Supp. 351, and the Attorney General Successor to the Alien Property Custodian,[1] appeals.

The significant facts are few. Miss Willenbrock was German born. She was naturalized in this country in 1928. In 1932, while in France, employed as a governess by an American employer, she went back to Germany to take care of her father and remained in Germany after his death in 1933. Except for eight months she was in Germany from 1932 to 1949. She inherited some property and lived off the income therefrom until the premises were destroyed by a bomb during the war. She lost her first naturalization for reasons not necessary to go into here and was again naturalized in 1955. The plaintiff's state of mind is summed up by the trial judge in saying that "she never wanted to be considered a German citizen or resident, that she desired to be, at all times, an American citizen and to return to the United States to live when it appeared to her to be possible to do so without sacrificing her German property interests."

Section 9(a) permits suit in the district court by "any person not an enemy" as defined in Section 2(a) of the statute. The question to be decided, therefore, is the very narrow one whether the plaintiff is included within the statutory exclusion. It does not, however, turn upon finding that Miss Willenbrock was or was not an "enemy" of the United States in any literal sense. No one suggests that she was in any way disloyal to her adopted country. The problem is a technical one concerning the interpretation of the language in Section 2(a). There enemy is defined, inter alia, as "any individual • • • resident within the territory • • • of any nation with which the United States is at war."

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[1] Pursuant to Exec. Order No. 9788, 3 C.F.R. 169 (1943-48 comp.), 50 U.S.C.A. Appendix, § 6 note.

During the war was the plaintiff "resident" in Germany? The words "resident" and "residence" have no precise legal meaning although they are favorite words of legislators. Sometimes they mean domicile plus physical presence; sometimes they mean domicile; sometimes they mean something less than domicile. All this is well established and the general statement would not be quarreled with.[2] We think the learned district judge in this case inclined to treat the term as though "residence" in the statute involved domicile. If the issue were domicile a good case could be made for finding that the plaintiff did not become domiciled in Germany because she always intended to return to the United States when she could do so without sacrificing her property interests. Cf. Dupuy v. Wurtz, 1873, 53 N.Y. 556.

We think, however, the authority which controls us here is Guessefeldt v. McGrath, 1951, 342 U.S. 308, 72 S.Ct. 338, 341, 96 L.Ed. 342. While the members of the Supreme Court differed as to one of the points in the case, they did not disagree with Mr. Justice Frankfurter's description of the content of "residence." Backed up by the legislative history the Court said, "'resident within' enemy territory implies something more than mere physical presence and something less than domicile."

If the term means something less than domicile we are quite clear that this plaintiff was resident in Germany. The length of time she was there is certainly indicative. One may, perhaps, stay in a place for seventeen years without becoming domiciled there; surely it is hard to think of a person staying that long without becoming a resident.

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[2] See McGrath v. Kristensen, 1950, 340 U.S. 162, 71 S. Ct. 224, 95 L. Ed. 173; United States v. Stabler, 3 Cir., 1948, 169 F.2d 995; Goodrich, Conflict of Laws 50-51 (3d ed. 1949); Beale, Residence and Domicile, 4 Iowa Law Bull. 3 (1918); Reese & Green, That Elusive Word, "Residence," 6 Vand. L. Rev. 561 (1953); Restatement, Conflict of Laws 2d, § 9, com. j (Tent. Draft No. 2, 1954).

Seventeen years is no temporary sojourn by any test. Furthermore, the plaintiff was not constrained to stay in Germany. See Guessefeldt v. McGrath, supra; United States v. Stabler, 3 Cir., 1948, 169 F.2d 995. The fact that one stays in a place by reason of economic desirability does not prevent the acquisition of a domicile there,[3] much less should it prevent one's being a resident.

Our conclusion that plaintiff was resident in Germany is supported by Brownell v. Oehmichen, 100 U.S.App. D.C. 214, 243 F. 2d 637, certiorari denied, 1957, 355 U.S. 842, 78 S.Ct. 49, 2 L.Ed. 2d 1. There is some trouble with Kaku Nagano v. McGrath, 7 Cir., 1951, 187 F. 2d 759, affirmed per curiam by an equally divided Court, 1952, 342 U.S. 916, 72 S.Ct. 363, 96 L.Ed. 685. Perhaps it can be explained, as the Government suggests, by the allegation of Mrs. Nagano that she was compelled to stay with her children in Japan.[4] Be that as it may, we think that the Guessefeldt case cited above gives us our mandate here.

There is a further element in this case, however, which was not brought to the notice of the court by counsel for either party. It was mentioned that there are two vesting orders. One was in 1947 (No. 9925, 12 Fed. Reg. 6797), and the other was in 1950 (No. 16340, 16 Fed. Reg. 107). The 1947 order had to do, according to an exhibit in the case, with the savings account which plaintiff had with the Girard Trust Company of Philadelphia. The vesting order does not say how much is involved but the judgment of the court indicates that it is $1,769.91. What has been said above with regard to "residence" applies to this order because plaintiff was a resident of Germany at the time.

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[3] See 1 Beale, Conflict of Laws § 22.1 (1935); Goodrich, Conflict of Laws § 29 (3d ed. 1949).

[4] When the case came back after remand, the "law of the case" doctrine was heavily emphasized in the court's opinion. Kaku Nagano v. Brownell, 7 Cir., 1954, 212 F. 2d 262.

Now the second vesting order bears date 1950. It has to do with ten shares of Pennsylvania Railroad stock and two declarations of trust certificates issued by City Bank Farmers Trust Company of New York. The value of the property in this seizure according to the judgment in the court below is $6,500. The complaint in this case says that the plaintiff returned to the United States October 16, 1949 and took up her residence in the Eastern District of Pennsylvania. The answer is an enigmatic one because it denies the allegation of this particular paragraph to the effect the plaintiff was a nonenemy. There is no finding of fact on the subject.

Assuming that it can be shown that the plaintiff was a resident of Pennsylvania beginning October 16, 1949, the provision of the statute discussed above does not apply to her. The vesting order applies to the situation existing at its date. Swiss Nat. Ins. Co. v. Miller, 1925, 267 U.S. 42, 45 S.Ct. 213; 69 L.Ed. 504; Rudenberg v. Clark, D.C. D.Mass. 1947, 72 F. Supp. 381, 383.

One more point is to be noticed. Following the description of the property in the second paragraph of the vesting order there is a clause saying:

> "* * * hereby determined:
>
> "3. That to the extent that the person named in subparagraph 1 hereof is not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany)."

Then there is a line drawn to some fine print below which says:

> "all determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest * * * "

However, this portion of the order seems not to be relevant to our case. The language of the Executive Order 9193, July 6, 1942, 50 U.S.C.A. Appendix, § 6 note, excludes from the category of that which may be seized " * * * credit instruments * * * and securities" except to the extent that the Alien Property Custodian determines that the inclusion of these items is necessary. We have no record of any such determination by him.

It appears, therefore, that the judgment of the court below must be reversed as to the property included in the first seizure of 1947 but as to that which was taken under the 1950 vesting order, it would appear that the plaintiff is entitled to recover if in fact she no longer was a resident of Germany when the 1950 order became effective.

APPENDIX E

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Trading With the Enemy Act, 40 Stat. 411, as amended, §§ 2(a), and 9(a), Tit. 50 App. U.S.C. §§ 2(a), and 9(a):

SEC. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

SEC. 9:

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property

Custodian or seized by him hereunder and held by him or by the Treasurer of the United States * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title * * * so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 174

ERNA CHRISTIANI-ONKEN a/k/a ERNA CHRISTIANI,
Petitioner

v.

ROBERT F. KENNEDY, Attorney General and as Successor to the Alien Property Custodian

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The findings of fact and conclusions of law of the district court (J.A. 27-33)[1] are unreported. The opinion of the Court of Appeals for the District of Columbia (Pet. App. A, pp. A-1-A-3) is reported at 301 F. 2d 546.

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[1] J.A. refers to the joint appendix prepared for the Court of Appeals and filed with this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 1962. The petition for a writ of certiorari was filed on June 12, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a German citizen who resided in Germany during the period from December 7, 1941 until April, 1946, and admittedly was at that time an enemy under Section 2(a) of the Trading With the Enemy Act, was precluded from maintaining an action under Section 9(a) of the Act for the return of property which the claimant owned while she resided in Germany and which was vested by the United States in 1951, at which time she was living in Switzerland.

STATUTE INVOLVED

The pertinent provisions of the Trading With The Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*, are set forth in Appendix E to the petition.

STATEMENT

This suit was brought by petitioner under Section 9(a) of the Trading With The Enemy Act to recover certain property vested by the United States under vesting orders issued in 1951. The property consists of (1) cash and securities held by the Swiss American Corp. in N.Y. in a number account for the Credit Suisse, a Swiss bank, and (2) a bank account held in the Guaranty Trust Co. of N.Y. under the name of a Mr. Franz Onken, deceased, c/o Credit Suisse, Lausanne, Switzerland.

Petitioner was German at birth, later acquired Swiss citizenship, and in 1931, reacquired German citizenship when she married a German national (J.A. 21). She resided in Germany from 1931 until April 1946 (J.A. 21, 51). Her husband managed or had an interest in a correspondence school in Germany (J.A. 70, 71, 72, 76). He joined the Nazi Party and, after the war, was "denazified" (J.A. 118, 147-148). In April 1946, she received permission from the occupation authorities and the Swiss Government to make a temporary visit to Switzerland on condition that she engage in no gainful employment and that she return to Germany at the end of four months (J.A. 22, 74-75, 78, 79). She obtained several extensions of her visitor's visa. At the time of the vesting orders in 1951, she was living in Switzerland pursuant to such an extension (J.A. 22). In 1956, she obtained permission to reside permanently in Switzerland (J.A. 79). In 1958 she became a Swiss citizen (J.A. 22). Her father, Franz Onken, had died in Switzerland in 1942 (J.A. 86). The property in issue is claimed by petitioner as her inheritance from the estate of her father.

The trial court ruled that the petitioner, by leaving Germany in 1946, had terminated her enemy status and that, since she was living in Switzerland at the time of the vesting orders, she was eligible to sue under Section 9(a) for the recovery of vested property.

The Court of Appeals reversed and remanded with directions to dismiss the complaint for lack of jurisdiction. It held that the enemy status of the claimant did not terminate when she left Germany for Switzerland but continued to the time of the vesting orders.

thus precluding suit under Section 9(a). The court relied upon its previous ruling in *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (C.A.D.C.), certiorari denied, June 25, 1962, No. 907, October Term, 1961, holding that enemy status acquired during the war as a result of German military occupation of the Netherlands did not terminate when the German occupation ended.

ARGUMENT

Petitioner does not deny that the property interests claimed in this action could have been vested between 1942 (when she acquired the property by inheritance) and 1946 (when she departed from Germany) and that, if this had occurred, she would have had no right of recovery. It is her view, however, that the property is beyond the reach of the Trading with the Enemy vesting program because her departure from Germany antedated the issuance of the Custodian's vesting orders (albeit the property had been "frozen" under this country's foreign funds control program from the very day the petitioner first acquired her interest therein).

The issue thus raised is identical in all respects, as petitioner agrees (Pet. 5), with the issue presented in *Rommel* v. *Kennedy*, argued and decided together with this case and now pending on petition for a writ of certiorari (No. 165). In our brief in opposition in No. 165, we have set forth our reasons for believing that one in petitioner's position could not shed her enemy status by departing from Germany and that her property, frozen in the United States, remained subject to the same disabilities as other enemy property.

As we there argue, the result reached by the court below is clearly correct and in accord with settled principles.[2]

CONCLUSION

For the reasons more fully stated in the companion *Rommel* case (No. 165), the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JOSEPH D. GUILFOYLE,
Acting Assistant
Attorney General.

JOHN G. LAUGHLIN, JR.,
PAULINE B. HELLER,
Attorneys.

JULY 1962.

[2] Since the Court of Appeals ruled that enemy status admittedly acquired by residence in enemy territory during the war was not lost by removal to neutral territory, there was no need to consider the further claims of the government that (1) the undisputed facts show that the petitioner retained her "residence" in Germany until 1956, when she was granted permission to reside permanently in Switzerland, and (2) the claimant failed to prove legal or beneficial ownership of the property claimed. If certiorari should be granted, the government reserves the right to urge these additional alternative grounds in support of the judgment below.

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